SERVED: November 9, 2004

NTSB Order No. EA-5121

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 5th day of November, 2004

MARION C. BLAKEY, Administrator, Federal Aviation Administration, Complainant, v. GARY ALAN SCHROEDER, Respondent.	)	Docket SE-16772

OPINION AND ORDER

Respondent has appealed from the written initial decision and order of Administrative Law Judge William A. Pope, II, issued on December 30, 2003, after a bifurcated 3-day evidentiary hearing on September 11 and December 15-16, 2003.[1] In that decision and order, the law judge affirmed the Administrator's

[1] A copy of the written initial decision and order is attached.

emergency[2] order revoking respondent's airline transport pilot certificate for violations of sections 91.17(a)(2) and 91.17(a)(4) of the Federal Aviation Regulations (FAR), 14 C.F.R. Part 91,[3] and revoking his first-class medical certificate for failure to meet the medical standards set forth in sections 67.107(b)(3), 67.207(b)(3), and 67.307(b)(3) (FAR, 14 C.F.R. Part 67).[4] As further discussed below, we deny respondent's appeal

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[2] Respondent waived the applicability of the Board's rules for emergency proceedings.

[3] Section 91.17 provides:

§ 91.17 Alcohol or drugs.

(a) No person may act or attempt to act as a crewmember of a civil aircraft --
* * * * *
(2) While under the influence of alcohol;
* * * * *
(4) While having .04 percent by weight or more alcohol in the blood.

[4] These three sections pertain to first-class, second-class, and third-class medical certificates, respectively, and contain identical language:

§ 67.107 [207, and 307] Mental.

Mental standards for a [first, second or third] -class airman medical certificate are:
* * * * *
(b) No substance abuse within the preceding 2 years defined as:
* * * * *
(3) Misuse of a substance that the Federal Air Surgeon, based on case history and appropriate, qualified medical judgment relating to the substance involved, finds—
(i)Makes the person unable to safely perform the duties or exercise the privileges of the airman certificate applied for or held; or
(ii)May reasonably be expected, for the maximum duration of the airman medical certificate applied for or held, to make the person unable to perform those duties or exercise those privileges.

and affirm the Administrator's order of revocation.

The emergency order of revocation, as amended, alleged, in part, the following facts and circumstances:

2. On or about December 26, 2002, you acted or attempted to act as second in command of Delta Air Lines flight number 739 ("flight 739"), a Boeing 757 civil aircraft, on a passenger-carrying flight ("ORF"), scheduled to depart from the Norfolk, Virginia, Airport, on December 26, 2002, at 6:05 AM with an intended destination of Cincinnati, Ohio.

3. On or about December 26, 2002, you reported for duty as a required crewmember of flight 739.

4. At the security screening checkpoint at the Norfolk, Virginia, Airport, Transportation Security Agency (TSA) personnel detected the smell of alcohol on your breath.

5. The TSA personnel then contacted local law enforcement personnel to report this incident.

6. Subsequently, you sat down in the First Officer's seat of flight 739 where the Norfolk, Virginia, Airport Authority Police found you.

7. While you were on duty and prior to the departure of flight 739, the Norfolk Police administered a breath test to you to determine the concentration of alcohol in your blood system.

8. The results of the above-described breath test revealed that you had a blood alcohol concentration of .07.

9. Approximately 30 minutes after the above breath test was administered another breath test was given to you that revealed that you had a .063 blood alcohol concentration.

10. At the time you acted or attempted to act as a crewmember of flight 739, as described above, you were under the influence of alcohol.

11. At the time you acted or attempted to act as a crewmember of flight 739, as described above, you had an alcohol concentration of 0.04 or greater.

12. The Federal Air Surgeon finds that your misuse of alcohol makes you unable to perform the duties or exercise the privileges of any airman certificate.

13. By reason of the foregoing, you lack the qualifications to be the holder of an airman pilot certificate.

The TSA security screener testified at the hearing that when respondent passed through the screening checkpoint he set off the metal detector alarm, requiring him to further screen respondent using a hand-held wand. The screener testified that in the course of this procedure he noted that respondent wobbled slightly when he stood up after removing his shoes, had an odor of alcohol, and responded to questions with mumbled or incoherent responses. He then called his supervisor, who also testified at the hearing that he smelled alcohol and that respondent mumbled in response to a question. The supervisor stated that on a scale of 1 to 10, with 10 being the highest, the intensity of alcohol odor he detected on respondent was 7 1/2 to 8. (September 11 session, Transcript (Tr.) 34.)

The TSA supervisor summoned an airport police officer who administered two alcohol breath tests to respondent using a hand-held preliminary breath testing (PBT) device, the first in the jetway outside the airplane and the second in the airport police station. The police officer testified that those tests, which were given about 30 minutes apart, yielded readings of 0.070 and 0.063, respectively. He also noted that respondent smelled like alcohol masked by mint and had bloodshot eyes.

Respondent acknowledges that he consumed several drinks the day before (including two margaritas at a friend’s house, two martinis at home alone, and an eggnog with rum with his brother),

beginning at about noon, and stated that he "could have had six drinks total but no more than seven. I'm pretty sure of that." (December 15 session, Tr. 154.) Respondent testified that he had his last drink on December 25 at about 5:00 p.m. Respondent further testified that he was not under the influence of alcohol the following morning when he reported for duty shortly after 5:00 a.m., and that he did not believe he had a blood alcohol content of greater than 0.04. On appeal, respondent challenges the law judge's findings of regulatory violations and argues that they should be overturned for a variety of reasons, each of which is discussed below.[5]

Section 91.17(a)(4)

Respondent argues that the readings from the PBT device used by the Norfolk police officer to ascertain his blood alcohol content were scientifically unreliable because of the following alleged deficiencies: (1) six years had elapsed since the fuel cell in the PBT device had last been replaced, whereas the manufacturer's guidance recommends replacement every two to five years (Exhibit R-16A); (2) a possibility exists that mouthpieces other than those supplied by the manufacturer were used for the tests;[6] (3) the PBT device was kept in an unlocked drawer in the

[5] The issues have been fully briefed by the parties and oral argument is not necessary. Accordingly, respondent's motion for oral argument is denied. See 49 CFR 821.48.

[6] The manufacturer's manual cautions that use of mouthpieces other than those designed/supplied by the manufacturer can result in inaccurate readings of up to 10-20 percent. (Exhibit R-16A.) The airport police officer testified that he did not know the manufacturer of the mouthpieces he used for respondent's tests.

airport's police station and there was no documented chain of custody; (4) there were inadequate records documenting the accuracy checks/calibrations of the PBT device;[7] (5) the airport police officer did not document his use of the machine with which the PBT device was checked for accuracy the day after this incident, and this indicates that inadequate records were kept to document the frequency of use of that machine;[8] and (6) there was no 15-20 minute observation period prior to administering the test, as suggested in the manufacturer's manual, which respondent's expert testified is intended to ensure that substances such as food, drink, smoke, belching, regurgitation, or "mouth alcohol" do not influence the breath reading.[9]

Respondent's expert testified that the combined effect of

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[7] The police officer testified that the PBT device used by the airport police department was checked for accuracy every six months against a more sensitive machine maintained by the Norfolk Police Department, and that the results of those checks were recorded on a piece of paper attached to the back of the PBT device. He testified that he did not know who performed the June 30, 2002 check (the last recorded check before this incident), and that a check he personally performed on December 27, 2002 (the day after this incident), showed that the PBT was properly calibrated.

[8] Respondent's expert testified that the alcohol-based solution contained in the Norfolk Police Department's machine would degrade each time it was used for calibration and, therefore, it is important to keep records of how often the machine is so used to assure that the solution is replaced at the appropriate time (after one month or 150 tests).

[9] The manufacturer's manual states that a 15-20 minute "deprivation period prior to testing will ensure 'mouth alcohol' [which manual indicated could be introduced by a recent drink of alcoholic beverage, medication containing alcohol, or regurgitation] has not influenced the breath alcohol reading." The manual also indicates the subject should not eat, drink, or smoke during the 15 minutes before the test.

all these possible inaccuracies could result in an error rate of as much as 50-70 percent. We disagree, and we find no basis for overturning the law judge's finding that the results of the PBT test were sufficiently reliable to prove the FAR 91.17(a)(4) violation.

First, the manufacturer's manual states that the PBT fuel cells are good for "thousands of tests," and that they "generally have a life of 2-5 years." The airport police officer testified that a representative of the manufacturer told him that fuel cells can actually last longer than two to five years, depending on how often they are used, and that they need to be replaced only when the test results are delayed or absent. The officer testified that the PBT exhibited no such problems on December 26, 2002.[10]

Second, there is no evidence that the airport police officer used anything other than a conforming mouthpiece for respondent's PBT test. Further, in the unlikely event that a non-conforming mouthpiece was used[11] and it resulted in the maximum amount of possible error (20 percent) in addition to the overall margin of

[10] The officer testified that he thought the PBT at issue was used only about once a month. Therefore, assuming approximately this level of usage for the six years prior to respondent's test, and given the manufacturer's assertion that the fuel cell is good for "thousands of tests," it should not have been depleted.

[11] We note that the officer who administered the PBT tests testified that he had received 300 hours of training in alcohol enforcement, including about 40 hours of training specific to PBTs, which, presumably, would have addressed the importance of using conforming mouthpieces.

error recognized by the manufacturer (5 percent),[12] and that both errors were false positives, we note that respondent's second reading would have been at least 0.048, which still exceeds the regulatory standard of 0.04.

Third, respondent has presented no persuasive argument or evidence showing how storage of the PBT device in an unlocked drawer in the airport police office would have affected the reliability of the readings.

Fourth, we think the piece of paper attached to the PBT device containing its accuracy check/calibration history, although admittedly informal, is a sufficient record for our purposes. There has been no showing that the accuracy check/calibration history recorded on that paper was inadequate or inaccurate.

Fifth, we do not think that the airport police officer's use of the Norfolk Police Department's machine to check the accuracy of the PBT device on December 27, 2002, without recording this check, constitutes persuasive evidence that such undocumented checks occurred with regularity, or that the machine's testing solution was degraded as a result of repeated undocumented checks.

Finally, respondent was in the presence of the officer for at least 30 minutes before the second test,[13] and the officer did

[12] The manufacturer's manual notes that the device will provide a reading that "should not vary more than minus 5% from a blood sample drawn at the same time."

[13] The law judge noted that respondent was in the officer's

not testify that he observed respondent eat, drink, smoke, or regurgitate during that time. Nor does respondent contend that he did so, or that he introduced anything into his mouth that might have interfered with the test during that period.[14]

In sum, we agree with the law judge that the result of the PBT test was sufficiently reliable to prove by a preponderance of the evidence that on December 26, 2002, respondent acted or attempted to act as a crewmember on flight 739 while having a blood alcohol content of 0.04 or greater, in violation of FAR 91.17(a)(4).

Section 91.17(a)(2)

Respondent challenges the witness testimony indicating that respondent was under the influence of alcohol at the time he reported for duty on December 26, 2002. He contends that the law judge should not have credited the testimony of the TSA screener and supervisor who detected the odor of alcohol and other indicia that he was under the influence of alcohol, and should instead have taken note of the fact that six Delta employees who came in contact with respondent on the morning of December 26, 2002, did not voice any concern about respondent's condition. The six

(..continued)
presence for the entire period of time between the first and second test (i.e., at least 30 minutes), but that the officer did not have the opportunity to observe respondent for a similar period of time before the first test and, therefore, accepted the second reading (of 0.063) as the operative reading for purposes of this case.

[14] Although respondent stated that he may have consumed some breath mints while still in the cockpit, that would have been more than 30 minutes before the second test.

employees respondent is apparently referring to are: the Delta gate agent who checked his badge on his way to the airplane; the four flight attendants who he passed on his way to the cockpit; and the captain, who was already in the cockpit when respondent arrived there, and who spent the following six hours with respondent. We note that only one of these six employees -- the captain of flight 739 with whom respondent was scheduled to fly that morning -- testified at the hearing. Nor does the record contain any support for respondent's apparent belief that their failure to comment on respondent's condition necessarily indicates an absence of concern.

As the law judge noted in his initial decision, three observers who did not know respondent or have any reason to be biased or prejudiced against him (the two TSA employees and the airport police officer), testified that he exhibited signs of alcohol intoxication: the smell of alcohol, impairment of speech including mumbling and incoherency, disorientation, wobbliness, and bloodshot eyes. He found that the captain's testimony that he did not see or smell any such indicia, "is simply not creditable in light of the weight of the other evidence to the contrary."

We defer to the law judge in credibility determinations, absent a showing that they are arbitrary or inherently incredible, which is not the case here. We further agree with the law judge that the physical characteristics reported by the three objective observers, coupled with the PBT reading in excess

of 0.04 discussed above, are sufficient to establish that respondent was under the influence of alcohol on the morning of December 26, 2002, in violation of FAR 91.17(a)(2).

Sections 67.107, 207, and 307(b)(3)

Respondent challenges the sufficiency of the evidence proffered by the Administrator in support of the Federal Air Surgeon's finding that, under sections 67.107, 207, and 307(b)(3), respondent's alcohol misuse made him unable to safely perform the duties or exercise the privileges of his airman certificates. Specifically, respondent objects to the Federal Air Surgeon's memorandum containing this finding (Exhibit A-4) on the basis that it constitutes hearsay, and contends that the regional air surgeon for the FAA's southern region, who testified that he concurred with the Federal Air Surgeon's determination, was not qualified to render an expert opinion on this point because he played no part in reaching this determination and did not become involved in the case until after the Federal Air Surgeon reached this determination.

The Board's rules of practice make clear that hearsay is admissible in these proceedings. (See 49 CFR 821.38.) Further, we disagree with respondent's contention that the regional air surgeon was unqualified to offer an expert opinion on whether respondent was medically disqualified under FAR 67.107, 207, and 307(b)(3) on the basis of the alleged facts in this case. We think he was qualified to render such an opinion by the nature of

his position and responsibilities.[15] But even without the regional air surgeon's testimony on this point, we think the Federal Air Surgeon's determination would still be amply supported by the factual evidence of respondent's alcohol use on December 25, 2002 (which could fairly be called misuse), and his condition on the morning of December 26, coupled with our case law holding that a single incident of substance abuse is sufficient to establish disqualification for medical certification under FAR sections 67.107, 207, and 307(b)(3).[16]

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and

2. The Administrator's order of revocation and the law judge's initial decision are affirmed.

ENGLEMAN CONNERS, Chairman, ROSENKER, Vice Chairman, and CARMODY, HEALING, and HERSMAN, Members of the Board, concurred in the above opinion and order. HERSMAN, Member, submitted the following concurring statement.

Concurring Statement of Member Hersman

I do not disagree with the outcome in this case, as the record clearly shows that the revocation of respondent Schroeder's pilot certificate is justified by the facts in this case. Nonetheless, this case brought to light a general principle relating to medical disqualification of pilots that is not clearly articulated in FAA regulations, but has developed through case law. I would like to take this opportunity to express my concerns.

[15] The regional air surgeon testified that he represents the Federal Air Surgeon in airman certification matters, and that he has made similar regulatory determinations in previous cases.

[16] Administrator v. Taylor, NTSB Order No. EA-5003 (2002).

The Board's decision states, at p. 12, that the Federal Air Surgeon's determination of disqualification was "amply supported by the factual evidence of respondent's alcohol use on December 25, 2002 (which could fairly be called misuse), and his condition on the morning of December 26, coupled with our case law holding that a single incident of substance abuse is sufficient to establish disqualification for medical certification...."

The FAA's medical regulations (14 C.F.R. § 67.107, 207, and 307) state that in order to qualify for a first, second, or third class medical certificate, a pilot must meet the following standard:

> (b) No substance abuse within the preceding 2 years defined as:
> ***
> (3) Misuse of a substance that the Federal Air Surgeon, based on case history and appropriate, qualified medical judgment relating to the substance involved, finds –
>
> (i) Makes the person unable to safely perform the duties or exercise the privileges of the airman certificate applied for or held.

I have no doubt that, in some cases, a single instance of alcohol misuse can be indicative of substance abuse and, therefore, justify the denial or revocation of a medical certificate in the interest of aviation safety. However, this may not be true in all cases, and I fear that we may be creating a situation where a single instance of alcohol use (regardless of whether it is labeled "misuse" by the FAA) results in a de facto revocation of a medical certificate.

Therefore, I urge the FAA to give careful consideration to its determinations of medical disqualification under this standard, and I would suggest that the Board should scrutinize such determinations in future enforcement actions that come before us, to ensure that they are supported by adequate factual and medical evidence in the record.

I also question whether the FAA is actually employing the discretionary medical judgment that the regulations appear to call for. It may well be that every time the FAA seeks revocation of a pilot certificate for a violation of 14 C.F.R. § 91.17 (acting or attempting to act as a crewmember while under the influence of alcohol or while having a blood alcohol content of 0.04 or greater), it automatically also seeks revocation of the pilot's medical certificate. If that is the case, then I would urge the FAA to consider amending its medical standards to reflect this reality. The FAA's regulations should honestly reflect the standards that are being applied to pilots. In other words, if a violation of § 91.17 is sufficient in and of itself

to justify revocation of a medical certificate, the rules should be amended to make this clear. I believe it is inappropriate to continue to rely on the Board's adjudicative authority to uphold a standard that is not codified in the FAA regulations.